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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

6 ANTHONY KISER,) 2:11-CV-00165-JCM-LRL
7)
8 v. Plaintiff,) **ORDER**
9 PRIDE COMMUNICATIONS, INC., *et al.*,)
10 Defendants.)

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12 Presently before the court is United States Magistrate Judge Lawrence R. Leavitt's report
13 and recommendation (doc. #23) regarding plaintiff Anthony Kiser's motion for circulation of
14 notice pursuant to 29 U.S.C. § 216(b) (doc. #11). Defendants Pride Communications, Inc. and
15 Craig Lusk have filed a motion for reconsideration (doc. #24), that this court will construe as an
16 objection. Plaintiff has responded to the objection (doc. #25) and defendants have replied (doc.
17 #26).

18 In the magistrate judge's findings and recommendations (doc. #23), he recommends that
19 the court grant plaintiff's motion for circulation of notice pursuant to 29 U.S.C. § 216(b) (doc.
20 #11) to those individuals similarly situated to plaintiff. Specifically, the magistrate judge held:

21 (1) the class should be conditionally certified with respect to, "All cable, internet or
22 telephone service installers who were employed by Pride Communications, Inc. in Las
23 Vegas, Nevada and who performed such work after February 23, 2008, and who: (A)
24 Where paid on a piece rate basis; and (B) Worked more than 40 hours a week and did not
25 receive proper overtime pay at time and on-half their regular hourly rate based upon such
26 piece rate earnings."

27 (2) Plaintiffs should be required to use the form of the [n]otice that follows this
28 [r]ecommendation; and

1 (3) Plaintiffs should be required to file all [c]onsents to [j]oiner in this lawsuit within
2 sixty (60) days from the date the [n]otice is mailed.

3 The definition of “similarly situated” is not found in the FLSA, nor has the Ninth Circuit
4 formulated a test to determine how the term should be applied. In adopting its recommendation,
5 the magistrate applied the two-tiered approach for determining whether potential plaintiffs are
6 “similarly situated” for purposes of § 216(b). This approach has been followed by a number of
7 courts, including this one. *See Williams v. Trendwest Resorts, Inc.*, 2006 WL 3690686, *4 (D.
8 Nev. Dec. 7, 2006); *Misra v. Decision One Mortgage Co., LLC*, 673 F. Supp. 2d 987, 992-93
9 (C.D. Cal. 2008); *Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 990 (C.D. Cal. 2006);
10 *Leuthold v. Destination America, Inc.*, 224 F.R.D. 462, 466 (N.D. Cal. 2004); *Pfohl v. Farmers*
11 *Ins. Group*, 2004 WL 554834, *2 (C.D. Cal. March 1, 2004).

12 Based upon the two-tiered approach, the magistrate judge determined that at the initial
13 notice stage, “a plaintiff need only make substantial allegations that the putative class members
14 were subject to a single decision, policy, or plan that violated the law.”

15 The defendants’ objection is premised on a recent unreported decision of the United
16 States District Court for the Middle District of Florida. That case, *Delano v. Mastec. Inc.*, Case
17 No. 8:10-cv-320-T-27-MAP, June 2, 2011 relies on the Eleventh Circuit’s view in *Dybach v.*
18 *State of Florida Dep’t of Corrections*, 942 F.2d 1562, (11th Cir. 1991), that conditional
19 certification is only proper where (1) other employees are similarly situated with respect to their
20 job requirements and with regard to their pay provisions and (2) other employees exhibit a desire
21 to opt in to the class. *See id.* at 1567-68. In effect, defendants argue that the standard employed
22 by the court was too lenient and the more rigorous Eleventh Circuit standard should apply.

23 Defendants’ arguments premised on *Dybach* were fully briefed in opposition to the initial
24 motion, and thus considered by Magistrate Judge Leavitt. This court finds that *Dybach* is not
25 binding on the district courts of the Ninth Circuit. In *Allerton v. Sprint Nextel Corp.*, 2:09-cv-
26 01325-RLH-GWF, this district succinctly summarized the precedential value of *Dybach* in the
27 Ninth Circuit:

28 Some courts, primarily (if not entirely) in the Eleventh Circuit, have required plaintiffs to

1 show that other individuals within the putative class desire to opt into the action. *Dybach v.*
2 *State of Florida Dep't of Corrections*, 942 F.2d 1562, (11th Cir. 1991). This requirement has not
3 been applied by district courts in the Ninth Circuit. *Davis v. Westgate Planet Hollywood Las*
4 *Vegas*, 2009 WL 102735, *12 (D. Nev. 2008); *Hoffman v. Secuirtas Secuirty Services*, 2008 WL
5 5054684, *5 (D. Idaho 2008); and *Mowdy v. Beneto Bulk Transp.*, 2008 WL 901546, *7 (N.D.
6 Cal. 2008).

7 The Central District of California has held similarly, explaining that *Dybach* has been relegated
8 to the Eleventh Circuit and not widely applied by other courts:

9 this additional requirement at the notice stage has almost never been applied outside of
10 the Eleventh Circuit, and has never been applied in the Ninth Circuit. Indeed, at least one
11 district court has identified the language in *Dybach* as ‘dicta’ and criticized it for
12 ‘conflict[ing] with United States Supreme Court’s position that the [FLSA] should be
13 liberally ‘applied to the furthest reaches consistent with congressional direction.

14 *Delgado v. Ortho-McNeil, Inc.*, 2007 WL 2847238, *2 (C.D. Cal. Aug. 7, 2007) (internal
15 citations omitted).

16 Upon review of the magistrate judge’s recommendation (doc. #23) and the objection and
17 opposition thereto,

18 IT IS HEREBY ORDERED ADJUDGED AND DECREED that the recommendations of
19 United States Magistrate Judge Lawrence R. Leavitt (doc. #23) regarding plaintiff Anthony
20 Kiser’s motion for circulation of notice pursuant to 29 U.S.C. § 216(b) (doc. #11) be, and the
21 same hereby are, AFFIRMED in their entirety.

22 IT IS THEREFORE ORDERED that plaintiff’s motion for circulation of notice pursuant
23 to 29 U.S.C. § 216(b) (doc. #11) be, and the same hereby is, GRANTED consistent with said
24 recommendations.

25 DATED: August 26, 2011.

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28 UNITED STATES DISTRICT JUDGE